Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER, 1993 TERM

CHARLES K. MONIN, JR., INDIVIDUALLY
AND AS CO-EXECUTOR PETITIONER

vs.

JOSEPH E. MONIN AND PAUL MONIN, INDIVIDUALLY AND AS CO-EXECUTORS, THOMAS RAPHAEL MONIN, MARTHA WHEELER, WILLIAM MONIN, CAROLYN BACKHERMS, LINDY ROBY,, DONALD MONIN, MONIN INC., SONNY MONIN, INC., JAMES ALVIN MONIN, THE ESTATE OF CHARLES K. MONIN, SR., DECEASED, THE ESTATE OF THELMA MONIN, DECEASED, CHALLEN P. MCCOY, MCCOY & SEAY, JOHN DOUGLAS HUBBARD, FULTON HUBBARD & HUBBARD, JOHN SALTSMAN, SALTSMAN & WILLETT, JOHN S. KELLEY, KELLEY & KELLEY, HANDMAKER & SEILER, TERRY HAWKINS, BEN HAYDON, MR. & MS. J. C. GREENWELL, BROWN, TODD & HEYBURN, BILL BROWN, AND THEIR ASSIGNS, SUCCESSORS, PARTNERS AND PROFESSIONAL FIRMS, AND HONORABLE LARRY RAIKES OF NELSON CIRCUIT COURT, COMMONWEALTH OF KENTUCKY

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the State trial court abused its discretion or denied the Petitioner due process and his right to counsel by failing to give the Petitioner notice and any fair opportunity to be fully heard in response to contempt proceedings or in mitigation of the Contempt Orders of the State Court; and

(2) Whether or not a State Judge has the power to enter an Order that compels a party to act contrary to federal law.

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OPINIONS BY APPELLATE COURTS

The Opinions, Orders and Judgments of the Appellate Courts of the Commonwealth of Kentucky appended hereto are as follows:

(1) Order denying discretionary review by the Supreme Court of Kentucky entered November 17, 1993.

(2) Opinion and Order of the Court of Appeals of the Commonwealth of Kentucky entered July 2, 1993.

JURISDICTIONAL GROUNDS OF THIS COURT

The Order denying discretionary review entered November 17, 1993 by the Supreme Court of Kentucky in reviewing the Order and Opinion of the Court of Appeals of Kentucky entered July 2, 1993, is sought to be reviewed by the Petitioner. This Court has jurisdiction to review the aforesaid Judgments by Writ of Certiorari pursuant to Title 28 U.S. Code 1257(3) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a

decision could be had, may be reviewed by the Supreme Court as follows: ...(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of a commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS

This Petition arises under the following provisions of the Constitution of the United States:

Due Process Clauses

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A., Const., Amend. 5

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
U.S.C.A., Const., Amend. 14, Sec. 1

Right to Counsel
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."
U.S.C.A., Const., Amend. 6

Supremacy Clause
"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
U.S.C.A., Const., Article VI, Cl. 2

STATEMENT OF THE CASE

In the last ten years, the Monin family of Bardstown, Kentucky has been involved in litigation consisting of two probate matters, the estates of their parents and five civil suits. On the 3rd day of February, 1991, the parties entered into a Settlement Agreement to resolve all pending litigation, including legal and related costs.

After the Petitioner executed the Settlement Agreement, he was restored as a co-executor of his father's estate and was given access to all of the estate documents. At that time, he discovered a 1987 appraisal of the major asset of the estate, real estate owned by a family corporation known as Monin, Inc., in the amount of $800,279.00, which was in the possession of and known to prior co-executors, Paul and Joseph Monin. The fair market value of this asset was estimated at over $1,000,000 in 1991.

Despite the 1987 appraisal, co-executors Paul and Joseph Monin filed a Kentucky Inheritance Return based on their valuation of the estate's interest in the sum of $212,380.45. They failed to file a Federal Estate Tax Return. Their position is that their valuation of a 49% minority interest in the stock of a closely held family corporation was appropriate. Fifty One percent of the stock is already owned by the Petitioner, who is the President of Monin, Inc.

At the request of the Petitioner, a noted tax attorney reviewed the estates and advised the Petitioner that under the rules and criteria permitting the devaluation of closely held assets that the valuation by the prior co-executors, based on the 1987 appraisal alone, was significantly under-valued and that a Federal Estate Tax Return was required to be filed. The tax attorney advised the Petitioner that he was personally liable, as an heir and as a co-executor for any taxes owed, penalties

and interest. Furthermore, criminal statutes pertaining to violations of Federal Tax Law may apply. If the Petitioner had known about the tax issues, he would not have entered into the Settlement Agreement.

When the Petitioner made efforts to renegotiate the Settlement Agreement and resolve the tax issues, he met with resistance by the Respondents. Therefore, the Petitioner refused to participate in transferring the stock of Monin, Inc. to carry out the Settlement Agreement.

When these issues could not be resolved between the parties, the Respondents moved for an Order of Compliance which was granted by the Honorable Judge Larry Raikes, Nelson Circuit Court, entered December 23, 1991 requiring all parties "to comply and to do all things necessary to carry out the Settlement Agreement of February 3, 1991 within thirty (30) days. Any party failing to do any and all things necessary and incidental in carrying out said

Agreement in the above time or any time thereafter shall be held in contempt of Court upon any party seeking a rule against the offending person."

The Trial Court added that any "willful violation" would result in the violator going to jail because the Court was "tired of messing with it." When counsel for the Petitioner advised the Court that the Petitioner was concerned about federal estate civil and criminal tax liability, the Court's response was while it would "not prejudge the reasons" anyone violating the Order would be "taking their chances." The Court concluded by adding that anyone who willfully violated the Order was entitled to a Show Cause hearing. The Court did not give the Petitioner any opportunity to be fully heard or present evidence.

After further negotiations between the Petitioner and the Respondents failed to resolve the pending questions, the Respondents

moved for a Order to hold the Petitioner in contempt for failing to transfer the stock under the Order of Compliance entered in December, 1991.

At the time the hearing was requested, counsel for all parties requested that the Court enter an Order mandating the personal appearance of the Petitioner and Don Monin, a resident of Alabama, at the scheduled Show Cause Hearing. On the record, it was agreed between all counsel and the Court, that the Petitioner and Don Monin would be notified by the Clerk, by mail. This Order was signed on the 20th day of March and entered on the 25th day of March, 1992, two days before the scheduled March 27, 1992 hearing. There is no indication in the record anywhere that this Order was mailed or otherwise served upon the Petitioner or Don Monin, or that they were notified of its existence.

As a result, neither the Petitioner nor Donald Monin attended the hearing. Although the Petitioner intended to attend the hearing, it was not expected that he would testify and that his counsel of record would present evidence on behalf of the Petitioner in response to the contempt proceedings. A last minute business problem called the Petitioner to Louisville, Kentucky at the time of the hearing.

During the cross-examination of the Respondents' first witness, the Court interrupted counsel and truncated the hearing when he learned that the Petitioner was not present. The Court inquired whether or not the Petitioner knew about the hearing and counsel stated he did, but that he did not represent the Petitioner personally but only in his capacity as a co-executor of the estate and that it was his impression that the Petitioner would be served with process or otherwise notified of the requirement that he personally appear before the Court. The Court responded

by immediately stating that it would sign an Order for the Petitioner's arrest making no reference to Don Monin who was also not present. When the Court interrupted cross-examination by counsel, the Trial Judge commented that we have "been over this before" and the Petitioner had ample opportunity to contest the matter and the tax situation was known to him at the time he entered the Order of Compliance in December of 1991. The hearing was summarily terminated without giving the Petitioner any opportunity to present any evidence whatsoever and denying counsel for the Petitioner the full and fair opportunity to finish his cross-examination of any witnesses or challenge any evidence to be offered by the Respondents. The Order entered on March 27, 1992 holding the Petitioner in contempt, speaks for itself:

> "This cause coming on for hearing on this date and Charles K. Monin, Jr. not present, and it appearing from the testimony that he had actual knowledge of this hearing at the time

> and on this date, and that the Court had heretofore orally and by Order requiring the carrying of all things necessary to affect the Settlement Agreement heretofore made February 3, 1991 and Mr. Charles K. Monin, Jr. not present and he had no reason for his failure to do so HE IS HEREBY HELD IN CONTEMPT OF COURT."

The Sheriff of Nelson County was also ordered to arrest and incarcerate the Petitioner for a period of thirty days or until he purged the contempt by doing what was necessary to carry out the Settlement Agreement. On March 30, 1992, the Trial Court entered an Order entitled "Supplemental Order" which reiterated that the Petitioner was subject to arrest and incarceration for thirty days unless he complied with the Settlement Agreement and added a denial of bond.

Under Civil Rule 59 of the Kentucky Rules of Civil Procedure, counsel for the Petitioner served the other parties with a Motion to set aside the Contempt Orders and provide the Petitioner with a full hearing in response to the contempt proceedings and in mitigation of

the same, which was served one day late under the ten day time limit of Civil Rule 59 based on the March 27, 1992 Contempt Order. No one objected on those grounds when the Motion was heard on May 6, 1992. The Court summarily denied the Motion commenting that the Petitioner "was hiding out and avoiding the Order and so there's no way I'm going to set it aside." The Civil Rule 59 Motion was timely served, based on the March 30, 1992 Contempt Order.

In addition to grounds for a new trial, Civil Rule 59 of the Kentucky Rules of Civil Procedure entertains a motion to alter or amend a judgment or vacate the same and further provides for a new trial or reopening of a Judgment with the taking of additional proof and amending the same on any action tried without a jury.

On June 12, 1992 the first Notice of Appeal to the Court of Appeals of the Commonwealth of Kentucky was filed within the

thirty day time period set out under Civil Rule 73.02 based on the May 13, 1992 Clerk's notation as recognized in the Opinion of the Court of Appeals. An immediate Stay of the Contempt Order was granted on the 1st day of July, 1992 and an Intermediate Stay was granted on the 31st day of August, 1992.

In an effort to get the Nelson Circuit Court in the interim to reconsider and set aside the Contempt Orders and underlying Settlement Agreement and related Orders, the Petitioner filed a Civil Rule 60.02(d)(f) Motion for an Evidentiary Hearing. That rule provides in part:

> "On Motion, a Court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order or proceeding upon the following grounds: ... (d) fraud affecting the proceedings other than perjury or falsified evidence; ... or (f) any other reason of an extraordinary nature justifying relief."

The Motion only needs to be made within a reasonable time not more than one year after the judgment, order or proceeding was entered

or taken. In support of the Motion, the Affidavit of the Petitioner was filed explaining why he did not attend the hearing of March 27, and addressing his concerns with regard to the potential civil and criminal liability under Federal and State Tax Law, which he had also placed on the record on prior occasions by Affidavit and supporting documents. At the Motion Hour on August 19 to set a hearing, an Affidavit by a Certified Public Account in support of the Petitioner's position was filed with the Court.

At that time, the Court entered another Calendar Order which states, "Motion for evidentiary hearing denied until such time as the Court of Appeals sets aside the Contempt Order and Mr. Charles Monin satisfies the Contempt Order." The Court orally added "I'm not going to hear anything as long as Mr. Monin is in contempt." The Court added that it was not going to grant the Petitioner any relief until the Court of Appeals rules on the

contempt matter and sets aside the same. When counsel attempted to demonstrate to the Court that an Evidentiary Hearing would satisfy the Court that the Settlement Agreement and related Orders should be set aside, which was the underlying basis for the Contempt Orders, and that the Petitioner, contrary to the Court's belief, was unaware of the Order requiring him to personally attend the hearing, the Court's response was that the Petitioner was aware of the hearing. Finally, the Court reiterated that it would do nothing for the Petitioner until the Court of Appeals says "I have to."

As a result, the Second Notice of Appeal based on the denial for a request for an Evidentiary Hearing under Civil Rule 60.02(d)(f) was filed on September 2, 1992 well within the thirty day time limit set out, supra. Both appeals were consolidated pursuant to an Order of the Court of Appeals of October 2, 1992.

Civil Rule 61.02 of the Civil Rules of Kentucky provides as follows with regard to preserving issues on appeal:

> "Rule 61.02 Substantial Error:
> A palpable error which affects the substantial rights of a party may be considered by the Court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice resulted from the error."

The same due process argument being raised before this Honorable Court was raised on appeal to the Court of Appeals directly with the underlying question of whether or not the State Judge has power to order a party to act contrary to Federal Law being briefed and argued before the Court of Appeals of the Commonwealth of Kentucky which rendered its Opinion entered July 2, 1993.

The Petitioner's Motion for Discretionary Review by the Supreme Court was denied on November 17, 1993.

Appended to this Petition are the Orders and Opinions of the Court of Appeals of the Commonwealth of Kentucky and the Supreme Court of Kentucky; the Orders of Contempt of the Nelson Circuit Court; and the Calendar Orders of the Nelson Circuit Court denying Civil Rule 59 and Civil Rule 60 relief.

REASONS FOR ALLOWANCE OF THE WRIT

Under the Supremacy Clause of the Constitution of the United States, Federal Tax Law takes precedence over State Law, which includes judicial decisions, and prohibits a State Judge from entering any Order which compels a party to act contrary to federal law.

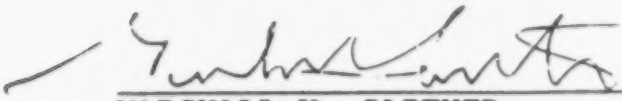
Without relief from this Honorable Court, the Petitioner will be deprived of his liberty unless he purges himself of the Contempt Orders by transferring the stock of Monin, Inc. to the Respondent heirs. By so doing, the Peitioner will have acted in violation of Federal Estate Tax Law. The tax liability of the estate has not been paid to the United States Government

which primarily comes from the assets of the Estate. Furthermore, in his joint capacity as an restored co-executor and heir, the Petitioner is personally liable for taxes, interest and penalties due and is subject to criminal prosecution for failing to comply with Federal Estate Tax Law.

The Trial Court and the Appellate Courts of the Commonwealth of Kentucky have denied the Petitioner a full, fair opportunity to be heard in response to contempt proceedings and in mitigation of the Contempt Orders. Furthermore, the Petitioner has been held in contempt without sufficient notice as established by a State Court Order and was denied assistance of counsel during the Show Cause proceedings why he should not be held in contempt. All of the above constitutes denial of his right to due process and his right to counsel and constitutes an improper deprivation of his liberty under the Fifth, Sixth and Section One of the Fourteenth Amendments of the

Constitution of the United States. Given the circumstances, the Petitioner has no other resort than review by this Honorable Court on his Petition for Writ of Certiorari.

Respectfully submitted,



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